WOODSVILLE SDN BHD

v.

TIEN IK ENTERPRISES SDN BHD & ORS & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
ABU SAMAH NORDIN JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NOS: W-02-710-2003 & W-02-711-2003]
26 FEBRUARY 2009

CIVIL PROCEDURE: *Contempt of court - Leave to issue committal proceedings against company liquidator - Whether prior leave of court is required before application for leave to issue committal proceedings is made*

CIVIL PROCEDURE: *Contempt of court - Leave to issue committal proceedings - Allegation of untrue statements made in affidavit - Whether prima facie case of contempt shown - Order 52 r. 2 Rules of the High Court 1980*

CIVIL PROCEDURE: *Contempt of court - Leave to issue committal proceedings - Setting aside of ex parte order granting leave to issue committal proceedings - Order 32 r. 6 Rules of the High Court 1980*

COMPANY LAW: *Winding-up - Suit against liquidator - Leave of winding-up court, whether a prerequisite - Liquidator officer of court - Prior leave required to apply for leave to issue committal proceedings against liquidator - Prior leave not obtained - Order for leave to issue committal proceedings against liquidator set aside - Companies Act 1965, s. 236(3)*

The 1st respondent was wound up under s. 218(1)(i) of the Companies Act 1965 ('the Act') *vide* a winding-up petition presented by the appellant. Pursuant to the aforesaid winding-up order, Gong Wee Ning ('the liquidator') was appointed as one of the liquidators for the 1st respondent. Subsequently, the appellant filed an *ex parte* application pursuant to O. 52 r. 2 of the Rules of the High Court 1980 ('the Rules') for leave for issue of committal proceedings against the liquidator and the 2nd respondent ('David Kuok') for their failure to disclose and or concealing to the court the existence of the 1st respondent's beneficial interest in certain lands ('the Tuallang lands'). The grounds of the application for

leave for issue of committal proceedings were that the liquidator and David Kuok had affirmed affidavits, either personally and/or on their behalf and filed in the removal application, wherein they stated that the 1st respondent has no beneficial interest in the Tuallang lands. It was alleged that the statements made by each of them were untrue and that they knew and/or ought to have known as untrue. The application for leave sought for issue of committal proceedings against the liquidator and David Kuok was allowed by the High Court. The liquidator and David Kuok then applied to set aside the said *ex parte* order granted against them. The applications to set aside the said *ex parte* orders were allowed by the learned judge and hence, these appeals. The appellants argued that the learned judge erred in law in deciding that the appellant was required to initiate a separate and distinct leave application from the court before filing the *ex parte* application for leave for issue of committal proceedings against the liquidator.

Held (dismissing the appeal with costs)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

(1) Under s. 236(3) of the Act, the liquidator, having been appointed by the court, is an officer of the court and thus leave of the court is needed before an action is commenced against him and officers like him. Prior leave from the court was required before the appellant could make any application for leave under O. 52 r. 2 of the Rules as against the liquidator, he being an officer of the court. The appellant was not armed with such leave when he made the application against the liquidator. Whether the purported action against the liquidator was in another court or the winding-up court was irrelevant. As such, the learned judge was correct in setting aside the said *ex parte* order obtained against the liquidator. (paras 17, 18 & 19)

(2) The appellant failed to show that he had a *prima facie* case against David Kuok to justify the court to grant leave pursuant to O. 52 r. 2 of the Rules. The alleged omission in the affidavit of Cyril Gomez in relation to the Tuallang lands and which affidavit was made, *inter alia*, on behalf of David Kuok was not enough to justify a contempt charge or even be sufficient to draw inferences against David Kuok. (para 29)

(3) There were no merits in this appeal. The learned judge was correct in setting aside the *ex parte* order for leave against David Kuok. Order 32 r. 6 of the Rules provides that the Court may set aside an order made *ex parte*. The learned judge had exercised her discretion judiciously and hence there was no reason to disturb her decision. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama telah digulung di bawah s. 218(1)(i) Akta Syarikat 1965 ('Akta') melalui petisyen penggulungan yang dikemukakan oleh perayu. Ekoran perintah penggulungan tersebut, Gong Wee Ning ('pelikuidator') dilantik sebagai salah seorang pelikuidator responden pertama. Berikutnya, perayu memfail satu permohonan *ex parte* di bawah A. 52 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('kaedah') memohon kebenaran untuk memulakan prosiding komital terhadap pelikuidator dan responden kedua ('David Kuok') atas kegagalan mereka untuk mendedahkan dan/atau menyembunyikan dari mahkamah berkaitan kewujudan kepentingan responden pertama dalam beberapa tanah ('tanah-tanah Tuallang'). Alasan-alasan bagi permohonan prosiding komital adalah bahawa pelikuidator dan David Kuok telah mengikrar afidavit-afidavit, sama ada secara persendirian dan/atau bagi pihak mereka dan yang difailkan dalam permohonan untuk mengenepikan, di mana mereka menyatakan bahawa responden pertama tiada kepentingan benefisial dalam tanah-tanah Tuallang. Didakwakan seterusnya bahawa kenyataan yang dibuat oleh setiap mereka adalah tidak benar dan bahawa mereka mengetahui atau sepatutnya mengetahui bahawa ia adalah tidak benar. Permohonan untuk kebenaran memulakan prosiding komital terhadap pelikuidator dan David Kuok telah dibenarkan oleh Mahkamah Tinggi. Berikutnya, pelikuidator dan David Kuok memohon untuk mengenepikan perintah *ex parte* yang dibuat terhadap mereka. Permohonan untuk mengenepikan tersebut telah dibenarkan oleh yang arif hakim, sekaligus membangkitkan rayuan-rayuan di sini. Perayu-perayu berhujah bahawa yang arif hakim telah khilaf di sisi undang-undang apabila memutuskan bahawa perayu-perayu dikehendaki memohon permohonan kebenaran yang berasingan kepada mahkamah sebelum memfailkan permohonan *ex parte* bagi kebenaran memulakan prosiding komital terhadap pelikuidator.

Diputuskan (menolak rayuan dengan kos)
Oleh Mohd Ghazali Yusoff HMR menyampaikan penghakiman mahkamah:

(1) Di bawah s. 236(3) Akta, pelikuidator, setelah dilantik oleh mahkamah, adalah seorang pegawai mahkamah dan oleh itu kebenaran mahkamah adalah diperlukan sebelum sesuatu tindakan dimulakan terhadapnya atau terhadap pegawai-pegawai sepertinya. Kebenaran terdahulu mahkamah adalah perlu sebelum perayu boleh membuat sebarang permohonan untuk kebenaran di bawah A. 52 k. 2 Kaedah terhadap pelikuidator, disebabkan beliau seorang pegawai mahkamah. Perayu tidak mempunyai kebenaran tersebut bilamana membuat permohonan terhadap pelikuidator. Sama ada tindakan yang dibuat terhadap pelikuidator dibuat di mahkamah lain atau di mahkamah penggulungan adalah tidak relevan. Yang arif hakim, dengan itu, betul apabila mengenepikan perintah *ex parte* tersebut yang diperolehi terhadap pelikuidator.

(2) Perayu gagal menunjukkan bahawa beliau mempunyai kes *prima facie* terhadap David Kuok bagi mewajarkan mahkamah memberikan kebenaran di bawah A. 52 k. 2 Kaedah. Ketinggalan yang didakwa berlaku dalam afidavit Cyril Gomez berhubung dengan tanah-tanah Tuallang, afidavit mana dibuat antara lain bagi pihak David Kuok, adalah tidak mencukupi untuk mewajarkan satu pertuduhan menghina dan malah tidak mencukupi untuk membangkit apa-apa inferens terhadap David Kuok.

(3) Tidak ada merit pada rayuan ini. Yang arif hakim betul dalam mengenepikan perintah *ex parte* untuk mendapat kebenaran terhadap David Kuok. Aturan 32 k. 6 Kaedah memperuntukkan bahawa mahkamah boleh mengenepikan suatu perintah yang dibuat secara *ex parte*. Yang arif hakim telah melaksanakan budi bicaranya secara penuh kehakiman dan kerana itu tiada alasan untuk mengganggui keputusan beliau.

Case(s) referred to:
Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 CA ***(refd)***
Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors (No 2) [2007] 9 CLJ 400 HC ***(refd)***
In re Maidstone Palace of Varieties, Limited Blair v. Maidstone Palace of Varieties, Limited [1909] 2 Ch 228 ***(refd)***
Zainal Abidin Puteh & Anor v. Che Wan Dvpt Sdn Bhd [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381 SC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 218(1)(i), 226(3), 236(3)
Rules of the High Court 1980, O. 32 r. 6, O. 52 r. 2(2)

For the appellant - Lim Kian Leong (Ong Chee Kwan & Tan Keng Teck with him); M/s Lee Ong & Kandiah
For the 1st respondent - Tan Hock Chuan (Cains Tan with him); M/s Tan Hock Chuan & Co
For the 2nd respondent - M Nagarajah (Sudesh Singh with him); M/s Shook Lin & Bok

Reported by Amutha Suppayah

JUDGMENT

Mohd Ghazali Yusoff JCA:

[1] There are two appeals before the court. The appeals are against the decision of Zainun Ali J (as she then was) in allowing the applications of the liquidator of Tien Ik Enterprises Sdn Bhd, the 1st respondent and David Kuok Khoon Hin, the 2nd respondent to set aside an *ex parte* order granting leave to apply for issue of order of committal against them.

The Background

[2] The 1st respondent was wound up on 9 June 1994 under s. 218(1)(i) of the Companies Act 1965 ("the Act") *vide* Winding-Up Petition No. D2-28-187-1990 presented by Woodsville Sdn Bhd, ie, the appellant.

[3] Pursuant to the aforesaid winding-up order, Gong Wee Ning (hereafter referred to as "the liquidator") was appointed as one of the liquidators for the 1st respondent.

[4] On 10 August 1998 the appellant filed an application for an order to remove the liquidator (hereafter referred to as "the removal application"). One of the grounds raised by the appellant to support the removal application was on an allegation that the liquidator has failed to carry out a proper investigation in relation to the 1st respondent's beneficial ownership of three pieces of land, the particulars of which are as follows:

A (a) Certificate of Title No 8864;

(b) Lease of State Land Title No 1395; and

(c) Lease of State Land Title No 1020;

B (hereafter referred to as "the Tuallang lands") which were then registered in the name of a locally incorporated company known as Tanjong Tin Dredging Malaysia Sdn Bhd ("TTDM"). At the material time the 1st respondent owned all the shares of TTDM.

C **[5]** The removal application was dismissed by the court on 31 May 2000 and is now pending appeal before this court.

[6] On 20 April 2001, the appellant filed an *ex parte* application pursuant to O. 52 r. 2 of the Rules of the High Court 1980 ("the
D Rules") for leave for issue of committal proceedings against the liquidator and David Kuok Khoon Hin, ie, the 2nd respondent (hereafter referred to as "David Kuok") who was at the material time a member of the committee of inspection appointed to act with the liquidator, for their failure to disclose and or concealing
E to the court the existence of the 1st respondent's beneficial interest in the Tuallang lands.

[7] The grounds of the application for leave for issue of committal proceedings were that the liquidator and David Kuok have affirmed affidavits, either personally and or on their behalf
F and filed in the removal application, wherein they stated that the 1st respondent has no beneficial interest in the Tuallang lands. It is alleged that the statements made by each of them were untrue and that they knew and or ought to have known as untrue. It is further alleged that the liquidator and David Kuok failed to disclose
G the true position of the Tuallang lands in the removal application even after they found out the existence of the Tuallang lands and that the beneficial interest of the same vest in the 1st respondent. It is finally alleged that the liquidator had committed contempt of court by failing to conduct any investigation on the existence of
H the Tuallang lands.

[8] The application for leave sought for issue of committal proceedings against the liquidator and David Kuok was allowed by the learned judge on 22 June 2001.

I

[9] On 6 August 2001, the liquidator filed an application by way of notice of motion (encl. 230) to set aside the said *ex parte* order granted against him. Subsequently on 11 October 2001 David Kuok made a similar application (encl. 236). Both applications to set aside the said *ex parte* orders were allowed by the learned judge on 24 July 2003 and hence, these appeals.

[10] In allowing the liquidator's application to set aside the said *ex parte* order, the learned judge said that following *Zainal Abidin Puteh & Anor v. Che Wan Dvpt Sdn Bhd* [1992] 3 CLJ 1539; ([1992] 1 CLJ (Rep) 381), "there has to be leave of Court before proceeding against liquidators and receivers" and that this requirement "cannot be ignored since these are officers of the court". As the appellant has not obtained such leave, the learned judge allowed the liquidator's application and set aside the said *ex parte* order against him.

[11] The learned judge's grounds for allowing David Kuok's application to set aside the said *ex parte* order against him were as follows:

(a) David Kuok did not affirm any affidavit in the removal application; the only affidavit that was filed was affirmed by one Cyril Gomez on behalf of David Kuok and the 3rd to the 5th respondents (who are not parties to these appeals);

(b) Cyril Gomez did not in his affidavit make any positive averment that TTDM did not own the Tuallang lands and that "this omission is not quite the same as it being a positive assertion of this fact"; and

(c) there is also non-disclosure of material facts by the appellant, namely, the appellant did not inform the court that it has filed an appeal to this court in relation to the removal application.

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[12] Before us, learned counsel for the appellant argued that the learned judge erred in law in deciding that the appellant was required to initiate a separate and distinct leave application from the court before filing the *ex parte* application for leave for issue of committal proceedings against the liquidator.

[13] Counsel for the appellant contended that since the committal proceeding is an ancillary proceeding which originates from the pre-existing proceedings filed in court, the appellant is not required by law to file a separate leave application for the purposes of initiating committal proceedings against the liquidator. Counsel then argued that the contempt committed by the liquidator arose in his capacity as a deponent of an affidavit and not in his official capacity as liquidator for the 1st respondent. He submitted that s. 236(3) of the Act which was discussed in *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 4 CLJ 11 is not applicable in this case. Section 236 of the Act provides for powers of liquidator and s. 236(3) reads:

> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Counsel argued that s. 236(3) of the Act has no bearing on the appeal before us. He contended as follows:

> This present appeal is not brought against the Liquidator in respect of the exercise of his powers under Section 236. Rather, it is brought against the Liquidator for filing misleading affidavits in the Appellant's Removal Application and also deliberately (as admitted by him, *albeit* legal advice) suppressing evidence (by refusing to inform the Honourable High Court on his discovery that the Tuallang Lands were beneficially owned by the 1st Respondent). The issue of the existence and ownership of the Tuallang Lands was very much a live issue in the Removal Application.

[14] In the course of canvassing his arguments, counsel for the appellant referred to the case of *In re Maidstone Palace of Varieties, Limited. Blair v. Maidstone Palace of Varieties, Limited* [1909] 2 Ch 228 and contended that leave of the winding-up court is required only when the proposed action against a liquidator is pursued in another court other than the winding-up court. In that case Neville J said (at p. 286) that the court "will not allow its officers to be subject to an action in another court with reference to his conduct in the discharge of the duties of his office, whether right or wrong". His grounds of judgment reads:

> In this case the applicant is a receiver appointed by this Court in a debenture-holders' action, and by virtue of that appointment he has had the management of the theatre known as the Maidstone Palace of Varieties. In the course of that management he made use of certain plant which is claimed by the respondent company as their property. They say that he had no right to use it except on the terms of paying them a rent, and they claim a considerable sum. It appears to me that a dispute of that kind is one which, as is shewn by *Aston v. Heron* (2 My & K 890), the Court will deal with itself, and that it will not allow its officer to be subject to an action in another Court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for any one aggrieved by his conduct is to apply to this Court in the action in which he was appointed. If any wrong has been done by the officer, the Court will no doubt see that justice is done, but no one has a right to sue such an officer in another Court, without the sanction of this Court. The present application is accordingly right in form. The respondents must therefore bring in their claim in the debenture-holders' action within fourteen days, and must be restrained from commencing any other proceedings against the receiver.

[15] In opposing the appeal, learned counsel for the liquidator contended, *inter alia*, that leave is required not only when misconduct of a liquidator is in issue but in any proceeding against a liquidator who is an officer of the court. To support his contention counsel referred to the case of *Zainal Abidin Putih, supra.* In that case, the respondent had obtained an order against the Co-operative Central Bank Bhd ("CCB") for the return of documents of titles of properties charged and for costs. The respondent consequently brought an action against the appellants, who had been appointed the receivers of CCB, for payment of the costs of the first action. The learned judge of the High Court ordered the appellants to pay the said costs. The appellants appealed. In allowing the appeal, the Supreme Court held that the appellants were appointed receivers by the High Court and as officers of the court, leave of the court should have been obtained to proceed against them in the court action. In delivering the judgment of the court, Gunn Chit Tuan SCJ (as he then was) said:

> We would start off by pointing out that the appellants were appointed receivers by the court and are therefore first and foremost officers of the court, and to use the words of Viscount Haldane LC in *William H Parsons & Ors v. The Sovereign Bank of Canada* ([1913] AC 160) 'put in to discharge certain duties

A prescribed by the order appointing him'. In the present case, the appellants were appointed by the High Court under sub-para (c) of para (1) of reg 9 of the Essential (Protection of Depositors) Regulations 1986, which reads as follows:

B > ... to manage the affairs and property of the deposit-taker and for such incidental or ancillary orders or directions in relation to such appointment as may, in the opinion of the Central Bank, be necessary or expedient;

C The deposit-taker in this case, ie the Co-operative Central Bank Bhd, remains in existence but has lost its title to control its assets and affairs. As the appellants were appointed by the court and are responsible to it and cannot obey the directions of the parties in the action, they do not stand in the position of agents to the parties who are interested at the suit of whom they are appointed (*Bacup Corporation v. Smith* ([1890] 44 Ch D 395) at p 398 per D Chitty J). But the important point in this case was that as the appellants are officers of the court, leave of the court should have obtained to proceed against them in the second originating summons and the case of *Re Maidstone Palace of Varieties Ltd* ([1909] 2 Ch 283) was correctly cited by counsel for the E appellants in support of his submission that leave of the court was necessary. Unfortunately the preliminary objection of counsel in the lower court was overruled by the learned judge for if his Lordship had upheld that preliminary objection, then the further prosecution of the second originating summons should have been restrained and dismissed with costs if leave was not obtained.

F **[16]** Counsel for the liquidator also referred to *Chi Liung Holdings Sdn Bhd, supra*, a decision of this court. In that case, a company had signed a tenancy agreement with the applicant in respect of certain premises. The agreement provided the company with an G option to purchase in the event that the owner intends to sell the premises. Subsequently, the company gave notice of its intention to exercise the option but the applicant did not immediately respond. Consequently the applicant gave notice to the company to vacate the premises by 1 August 1989. By that time, there was H already a petition filed to wind up the company. On 19 December 1989, the liquidator handed over the premises to the applicant. The applicant is now claiming arrears of rental from the liquidator. The liquidator, in turn, claimed the refund of deposit.

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[17] The issue before the trial court was whether the applicant was entitled to forfeit the deposit towards payment of the arrears of rental and whether the applicant could claim for the arrears from the liquidator. The court dismissed the applicant's originating motion because s. 226(3) of the Act which provides for obtaining leave of the court had not been complied with. The applicant appealed to this court. Section 226(3) of the Act reads:

> When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

The issue before this court was whether leave of the court was necessary before the applicant could commence his originating motion against the liquidator personally. This court agreed with the trial judge that the originating motion required the leave of the court before it could be brought, but not for the reasons found by the trial judge. This court held that under s. 236(3) of the Act (reproduced earlier) it is clear that the liquidator, having been appointed by the court, is an officer of the court and thus leave of the court is needed before an action is commenced against him and officers like him. In delivering the judgment of this court, Abu Mansor Ali, JCA said (at pp. 14-15):

> We would cite the legal position of receivers who are in the same position as officers of court. In the text book the *Law Relating To Receivers, Managers And Administrators* by Hubert Picarda at p 339 the learned author wrote:
>
> > A receiver, in the words of Viscount Haldane LC, 'is an officer of the Court put in to discharge certain duties prescribed by the order appointing him'. ... He is 'nothing more than the hand of the Court'. ... for the purpose of holding the property of the litigants, ... and the possession of the Receiver is simply the possession of the Court.'
>
> Then at p 373 of the textbook *Law Of Receivers* by PS Atchuthen Pillai, 2nd Edition the author wrote in para 27:
>
> > 27. Suit without leave is contempt of court and will be dismissed. A suit against a receiver when filed without leave of court is liable to be dismissed ...

> Institution of proceedings against a receiver without leave of the court is contempt of court. It is incompatible with the dignity and authority of the court to allow its officer to be summoned before any tribunal ...
>
> As we have stated we were unanimous that the applicant should have obtained leave before making his application below, for the attitude of a winding up court has been that some form of leave is required.

The learned judge then said (at p. 17):

> While we agree that the applicant may proceed against the liquidator, we are however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding up judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation.

[18] We would agree with the submission of learned counsel for the liquidator. Upon perusing the authorities referred to earlier, we are of the unanimous view that prior leave from the court is required before the appellant can make any application for leave under O. 52 r. 2 of the Rules as against the liquidator, he being an officer of the court. It is clear that the appellant was not armed with such leave when he made the application against the liquidator.

[19] As discussed earlier, learned counsel for the appellant in referring to *In re Maidstone Palace of Varieties, Limited,* argued that leave of the winding-up court is required only when the proposed action against a liquidator is pursued in another court other than the winding-up court. We do not agree with counsel's proposition. Whether the purported action against the liquidator is in another court or the winding-up court is irrelevant. In the instant case the appellant alleged that the liquidator has committed contempt of court by failing to conduct any investigation on the existence of the Tuallang lands as a result of which it is initiating committal proceedings against the liquidator in the course of the winding-up of the 1st respondent. The liquidator has yet to be released or has yet to apply to court for an order that he be released and that the company be dissolved. Pending that, he is still an officer of the court and any proposed action against him by the petitioner as in this case for any alleged wrongdoing will still need the sanction of the winding-up court. As such, we are of the view

that the learned judge was correct in setting aside the said *ex parte* order obtained against the liquidator. On this ground alone, we would dismiss the appeal by the appellant with costs. We would also order that the deposit be remitted to the liquidator to account of taxed costs.

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[20] This appeal is against the decision of the learned judge in allowing the application of David Kuok to set aside the said *ex parte* order obtained against him pursuant to O. 52 r. 2 of the Rules as discussed earlier. It is common ground that the issue of any requirement for separate leave as in the case of the liquidator does not arise here.

[21] In canvassing this appeal, learned counsel for the appellant contended that at all material times, David Kuok was fully aware of the 1st respondent's beneficial interest in the Tuallang lands. He also pointed out that David Kuok was fully appraised of the removal application and that one of the grounds relied by the appellant in that application was David Kuok's failure to carry out investigations into the ownership of the Tuallang lands.

[22] With regards to the issue raised by David Kuok that he never affirmed any affidavit in opposing the removal application, counsel for the appellant pointed out that in the affidavit affirmed by Cyril Gomez, the latter stated that he was duly authorised to affirm the affidavit on behalf of the 2nd to the 5th respondents; that would include David Kuok. Counsel then submitted that in his affidavit, Cyril Gomez categorically adopted the averments made by the liquidator who denied the appellant's assertion as to the existence and beneficial ownership of the Tuallang lands by the 1st respondent. Counsel argued that it is trite that a person who authorises a deponent to affirm an affidavit on his behalf is bound by the contents of such an affidavit and by reason of the aforesaid, David Kuok is bound by the contents of the affidavit affirmed by Cyril Gomez in opposing the removal application.

[23] Counsel for the appellant further pointed out that it is pertinent to note that during the course of the removal application, David Kuok did not make any attempt to correct the averments made by Cyril Gomez in the latter's affidavit and to disclose to the court that the Tuallang lands were beneficially owned by the 1st respondent even though David Kuok was fully

aware that the existence and ownership of the Tuallang lands was a live issue in the removal application. Counsel then submitted that David Kuok's contention that he did not mislead the court on the ground that the offending affidavit was filed by Cyril Gomez is totally misconceived as David Kuok was fully aware that the court was considering the issue of ownership of the Tuallang lands to determine whether there was misconduct by the liquidator.

[24] Counsel for the appellant concluded that David Kuok's decision not to disclose this vital information, *viz.*, the existence and ownership of the Tuallang lands before the delivery of the decision on the removal application is a deliberate obstruction of justice and a calculated act to demean the integrity of the Court which is tantamount to misconduct in the face of the Court and therefore David Kuok has committed contempt of court.

[25] In opposing this appeal, learned counsel for David Kuok submitted that if all the cause papers relating to the removal application were disclosed in the said *ex parte* application for leave, the facts would show that there is no *prima facie* evidence of contempt against David Kuok. Counsel then referred to the case of *Edmund Ming Kwan v. Extra Excel (Malaysia) Sdn Bhd & Ors (No 2)* [2007] 9 CLJ 400. That case relates to an application by a petitioner in a petition presented under s. 181 of the Act for leave to make an application for an order of committal for contempt of court against the 2nd and 4th respondents on the grounds that the 2nd respondent had wilfully and intentionally made false and misleading statements in his affidavits and against the 4th respondent for affirming an affidavit wherein he adopts the contents of the 2nd respondent's affidavits and for authorizing the 2nd respondent to affirm certain affidavits. In dismissing the application, Vincent Ng J (as he then was) said (at pp. 280-281):

> On the question whether the statement was intended to be false and misleading *(mens rea)* and whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice, the court would have to: (i) firstly, look at the relationship between the alleged false statements and the issues to be decided in the main proceedings (see *Keeley v. Brooking* [1979] 25 ALR 45); (ii) secondly, bear in mind that unlike the offence of perjury, contempt requires the actual or inevitable intent or consequence of frustrating or obstructing the administration of justice (see *Jaginder Singh & Ors v. Attorney-*

General [1983] 1 CLJ 69; [1983] CLJ (Rep) 176, *Coward v. Stapleton* [1953] 90 CLR 573, *Re Bride, Ex-parte Steward* [1984] WB 455, *R v. Christopher Charles Murfett* [2004] VSC 160 and *Halsbury's Laws of England*, 4th Ed Vol 9(1) pp 242-243; (iii) thirdly, be mindful that a 'mere falsity of evidence is not enough to justify a contempt charge' (see *Yee Sang Metal* [2002] HKCU 1255); and, (iv) fourthly, be slow to draw inferences from affidavits as to the *bona fides* or *mala fides* of the alleged contemnor (see in *Re Smith and Fawcett Ltd* [1942] Ch 304.

[26] Counsel for David Kuok pointed out that the appellant had, in paragraph 4.1.5 of its statement pursuant to O. 52 r. 2(2) of the Rules of the High Court 1980 filed in the course of the *ex parte* application for leave for issue of order of committal, alleged as follows:

> Even assuming that the 2nd Respondent had only discovered the Tuallang lands in October and or November 1998 (which is denied), the 2nd Respondent failed and or omitted to disclose to this Honourable Court the existence of the Tuallang lands and to file an affidavit at the earliest opportunity correcting his earlier position that such lands did not exist. The fact is that the 2nd Respondent did not disclosed to or concealed from the Liquidator and to this Honourable Court that TTDM belongs to the Company and that he and or with other Respondents continue to control and manage the same.

[27] Counsel for David Kuok then submitted that following the case of *Edmund Ming Kwan, supra,* the relationship of the alleged false statement and the issues to be decided in the removal application has to be considered. However, he pointed out that David Kuok did not affirm any affidavit in the removal application. He also pointed out that the impugned affidavit was affirmed by Cyril Gomez for and on behalf of not only David Kuok but also for the 3rd to the 5th respondents. Further, Cyril Gomez did not make any averment that TTDM did not own the Tuallang lands and hence there was nothing to correct. As such, counsel submitted that it is fallacious to suggest that Cyril Gomez or David Kuok through Cyril Gomez confirmed the non-existence of the Tuallang lands.

[28] In conclusion counsel submitted that the said *ex parte* order for leave to commence committal proceedings against David Kuok were devoid of evidence and merits and hence the learned judge was right to have set aside the order that she granted.

[29] We agree with the submission of learned counsel for David Kuok. We find that the appellant has failed to show that he has a *prima facie* case against David Kuok to justify the court to grant leave pursuant to O. 52 r. 2 of the Rules. We do not think that the alleged omission in the affidavit of Cyril Gomez in relation to the Tuallang lands and which affidavit was made, *inter alia*, on behalf of David Kuok would be enough to justify a contempt charge or even be sufficient to draw inferences against David Kuok. We fully adopt the requirements that have to be considered by the court in determining the question as to whether a statement was intended to be false or misleading and whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice as summarised by Vincent Ng J in *Edmund Ming Kwan, supra*.

[30] We find no merits in this appeal. We are of the view that the learned judge was correct in setting aside the *ex parte* order for leave against David Kuok. Order 32 r. 6 of the Rules of the High Court 1980 provides that the court may set aside an order made *ex parte*. We find that the learned judge has exercised her discretion judiciously and hence find no reason to disturb her decision. As such, we hereby dismiss this appeal with costs and order that the deposit be remitted to the 2nd respondent to account of taxed costs.